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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,

Petitioners,

v.

LARRY'S DRIVE-IN PHARMACY,
INC., a West Virginia corporation,

Respondent.

CIVIL ACTION NO. 04-C-33
(Boone County Circuit Court)

APPEAL NO. 06-1511

BRIEF OF PETITIONERS ON CERTIFIED QUESTION

Certification Order Entered
JUNE 2, 2006

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Dated: October 25, 2006

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TABLE OF AUTHORITIES

Points & Authorities Relied Upon in Petition

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TABLE OF EXHIBITS

EXHIBIT	DESCRIPTION
A	AFFIDAVIT – THE HON. ROBERT C. CHAMBERS
B	AFFIDAVIT – THE HON. MICHAEL SHAW
C	AFFIDAVIT – THE HON. LARRY TUCKER
D	AFFIDAVIT – THE HON. J. ROBERT ROGERS
E	AFFIDAVIT – THE HON. TRUMAN CHAFIN
F	HOUSE BILL 2871, 2005 WV REG. 1163 (3/4/05)
G	SENATE BILL 486, 2005 WV REG. 1501 (3/8/05)

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TO: The Honorable Justices of the Supreme Court of Appeals of West Virginia:

Kind of Proceeding and Nature of the Rulings

The Circuit Court of Boone County has certified the following question of law for review: "In a civil action filed against a defendant licensed pharmacy for allegedly having negligently dispensed medication, is the pharmacy a 'health care provider,' as defined by West Virginia Code § 55-7B-2(c)?" This appeal solely addresses this certified question.

Statement of Facts
Relevant to Certified Question

In February 2002, the Petitioner, August Eugene Phillips ["Mr. Phillips"], suffered serious personal injury after taking a toxic dose of Colchicine, a gout medication, that was dispensed by the Respondent pharmacy with incomplete typed instructions. As a result of those incomplete prescription instructions, Mr. Phillips sustained toxic poisoning from too much Colchicine in a given day which resulted in loss of kidney function and other serious ailments. Since that time, Mr. Phillips has undergone kidney dialysis, most recently at home, each night, for twelve hours. At present, Mr. Phillips is required to travel three days a week from his home in Logan County, West Virginia to the kidney dialysis center located in South Charleston, West

Virginia for dialysis. This condition will never improve. Mr. Phillips will undergo kidney dialysis for the remainder of his life. Mr. Phillips and his wife, Cheryl, ["Petitioners"] filed a Complaint on March 5, 2003 in the Circuit Court of Boone County, West Virginia naming as defendants Larry's Drive-In Pharmacy, Inc. ["Larry's Drive-In Pharmacy" or "Respondent"], which filled and dispensed the incomplete prescription for the Colchicine, and the physician who prescribed the Colchicine, alleging that the negligence of each combined to cause Mr. Phillips' injuries and damages. The Petitioners settled with the physician and are continuing their case against the Respondent, Larry's Drive-In Pharmacy.

While still in the pretrial stage of litigation, the Petitioners brought their motion *in limine* seeking a ruling that Section 55-7B-2(c) of the Medical Professional Liability Act of 1986 ["MPLA" or "Act"], as amended, did not apply to Larry's Drive-In Pharmacy, by reason that the Respondent pharmacy had raised as a defense in its Answer to Petitioners' Complaint that it was entitled to the protection set forth in the 2003 amendment to the MPLA. Following a hearing on March 16, 2006, the Honorable E. Lee Schlaegel denied the Petitioners' motion *in limine*, ruling that pharmacies were included in the definition of a health care provider within the MPLA. The Petitioners disagreed with this ruling and, therefore, sought certification of the question. The circuit court issued its Certification Order on June 21, 2006.

Proposed Syllabus Points

1. Where the issue on appeal is a question of law or involves an interpretation of a statute, as in this case, the Supreme Court applies a *de novo* standard of review. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144

W.Va. 137, 107 S.E.2d 353 (1959).

3. A court construing an ambiguous statute shall ascertain the legislative intent. Affidavits from joint conference committee members which drafted the ambiguous legislation are admissible as an aid in ascertaining legislative intent. *Silver v. Brown*, 63 Cal.2d 841, 48 Cal. Rptr. 609, 409 P.2d 689 (1966).

4. When a Joint Conference Committee has purposefully omitted a class of persons or entities from a statutory definition, courts are not free to amend the statute by judicial activism to include the purposefully excluded group. *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996).

5. The proper method for expanding a statutory definition is to follow the legislative process. First, there is an introduction of the proposed amendment, or expansion, during a legislative session, to an existing statute. Then, by passage of the proposed amendment, or expansion, by a majority vote of both legislative bodies, it is signed into law by the executive officer or, in the alternative, it becomes law if there is no action by the executive officer within ten (10) days after receipt. This then formally amends statutory language. See generally, W. Va. Const., Art. VI.

Summary of the Argument

Section 55-7B-2(c), which defines "health care provider" for purposes of the MPLA, is unambiguous and clearly does **not** include pharmacies. Alternatively, assuming without admitting that this statute is ambiguous, this Court must ascertain the legislative intent to determine whether pharmacies were intended to be included in the MPLA's definition of "health care provider." To prove intent, the Petitioners filed Affidavits from five of the West Virginia joint conference committee members who drafted the MPLA, as adopted in 1986. The joint conference committee members intentionally and purposefully omitted pharmacies from inclusion in

the MPLA because they were not defined by statute as a "health care provider" for which the statute was enacted. The Respondent pharmacy did not file any counter-affidavits.

The Statute at Issue

In 1986, the West Virginia Legislature enacted the MPLA, § 55-7B et seq. The Petitioners filed their Complaint on March 5, 2003. Earlier in 2003, the Legislature enacted several changes to the MPLA, with said amendments to be effective July 1, 2003. W. Va. Code § 55-7B-8(b) and "Editor's Notes" to W. Va. Code § 55-7B-2. Thus, the original 1986 definition of "health care provider" is the version of West Virginia Code § 55-7B-2(c) which controls this case.[1] It provides:

> "Health care provider" means a person, partnership, corporation, facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, or an officer, employee or agent thereof acting in the course and scope of such officer's, employee's or agent's

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[1]The 2003 Amendments to the MPLA resulted in some of the sections being re-numbered. Under the 2003 amendment, the definition of "health care provider" was re-numbered to become § 55-7B-2(g), and the definition was purposefully expanded to add "emergency medical services authority or agency." As amended in 2003, the statutory definition of "healthcare provider" reads:

> "Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, *emergency medical services authority or agency*, or an officer, employee or agent thereof acting in the course and scope of such officer's, employee's or agent's employment.

W. Va. Code § 55-7B-2(g) (2003, effective July 1, 2003) (new language in *italics*). The 2003 amendment was obviously in response to *Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246, 507 S.E.2d 124 (1998), which is discussed herein at pages 9-10.

The 2003 amendments decreased the cap on non-economic damages from $1 million to $250,000.00 per occurrence. W. Va. Code § 55-7B-8 (2003)(effective July 1, 2003).

employment.

W. Va. Code § 55-7B-2(c) (1986).

Argument

I. Standard of Review.

The Supreme Court applies a *de novo* standard of review in deciding a certified question of law that involves the interpretation of a statute. *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

II. W. Va. Code § 55-7B-2(c) Is Clear and Unambiguous.

Section 55-7B-2(c) is clear and unambiguous. A long list of persons and entities are specifically named as "health care providers." "Pharmacies" are not on the list. "Pharmacies" are not specifically included in the definitions section of "health care provider." Pharmacies are not "health care providers" for purposes of the MPLA. An unambiguous statute must be applied as written. *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

III. Assuming Without Admitting That W. Va. Code § 55-7B-2(c) is Ambiguous, Then This Court Must Ascertain The Legislative Intent.

A. If The Statute Is Ambiguous, Then Rules of Statutory Construction Require Ascertainment of Legislative Intent.

A court construing an ambiguous statute shall ascertain the legislative intent. *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 232 (2000).

B. Conference Committee Members' Affidavits Prove Pharmacies Were Purposefully and Intentionally Omitted.

Robert C. Chambers, Michael Shaw, Larry Tucker, J. Robert Rogers, and Truman Chafin have provided Affidavits supporting the Petitioners' case, which original affidavits were filed in the circuit court (copies are attached hereto for the convenience of the Court). See, Exhibits "A,"

"B," "C," "D," and "E" hereto. Joint Conference Committee members Chambers, Shaw, Tucker, Rogers and Chafin were, in 1986, members of the West Virginia Legislature, and all were charged with drafting the final version of the legislation that was passed by the West Virginia Legislature known as the Medical Professional Liability Act of 1986 (MPLA). **These affidavits all show that the committee members intentionally and purposefully considered and omitted pharmacies from the definition of "health care provider."**

> It is not for this Court arbitrarily to read into [those statutes and regulations] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted (emphasis added).

Banker v. Banker, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996).

Affidavits from members of a joint conference committee concerning the meaning and intent of legislation formulated by the committee are admissible. *Silver v. Brown*, 63 Cal.2d 841, 48 Cal. Rptr. 609, 409 P.2d 689 (1966). While the affidavit of a legislator setting out his opinion on statutory meaning is not admissible to provide legislative intent, *Pristavec v Westfield Ins. Co.*, 184 W.Va. 331, 400 S.E.2d 575 (1990); *Cogan v. City of Wheeling*, 166 W.Va. 393, 274 S.E.2d 516 (1981), the multiple and consistent affidavits of the Conference Committee members, who drafted the legislation, is admissible as to why certain language was omitted. *Silver v. Brown, supra;* 2A Sutherland Stat. Const. § 48-08 (Reports of conference committees), § 48-10 (Statements at committee hearings -- "It is felt that the committee intent is the legislative intent"); § 48-12 (Views of Drafters); §48-16 (Statements of committeeman in charge of bill).

The affidavits propounded by the Petitioners do not show "opinions" of the affiants; rather, these affidavits show the legislative intent and prove the **fact** that "pharmacies" were discussed by the Joint Conference Committee in 1986 in the context of whether to include or exclude them from the scope of the MPLA. The affidavits further prove the fact that the Joint

Conference Committee intentionally and purposefully omitted "pharmacies." None of the affidavits purport to give an individual's "opinion" as to whether he meant for pharmacies to be included when he was voting on, or even when drafting, the final version of the MPLA. Rather, each affidavit proves the undisputed fact that the committee weighed including pharmacies and intentionally rejected them. These affidavits merely recite the legislative intent of this statute as it relates to the inclusion of pharmacies under the scope of the MPLA.

You wonder how these affiants remember such detail twenty years later? The answer is simple. The pharmacy lobbyist Richard Stevens appeared before the committee and asked that pharmacies and pharmacists be excluded! At the time, the pharmacy industry was fearful of mandatory claims reporting, liability insurance coverage and what it thought would be consequential financial burden of sky-rocketing premiums that it had indicated it had seen the medical community suffer as part of a medical malpractice crisis. Thus, the pharmacy industry lobbied to be excluded. The Committee agreed, but not for those reasons. It was the committee's position that pharmacies were not delivering medical care. The Act was to protect medical providers and it was the committee's final opinion that the class of health care providers did not include pharmacies. The Supreme Court should not re-write the statute now to include a class of persons or entities that was intentionally and purposefully omitted. These affidavits are powerful and persuasive evidence of the legislative intent.

C. *Expressio Unius Est Exclusio Alterius.*

"In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterus*, the express mention of one thing implies the exclusion of another, applies." Syl. Pt. 3, *Manchin v. Dunfee*, 174 W.Va. 532, 327 S.E.2d 710 (1984). Under this well-accepted canon of statutory construction, the fact that certain medical professionals are included, and pharmacies are not included, means that the legislature intended to exclude pharmacies. Express

mention of one thing implies exclusion of all others, or *expressio unius est exclusio alterius. State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995). The *expressio unius maxim* is premised upon an assumption that certain omissions are intentional. As the Court explained in *Riffle*, "[i]f the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply the doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation." 195 W. Va. at 128, 464 S.E.2d at 770.

D. *In Pari Materia.*

Statutes relating to different subjects are not *in pari materia*. *Taylor v. Hoffman*, 544 S.E.2d 387, 209 W.Va. 172 (2001). Whether pharmacies are "health care providers" under other pharmacy related statutes, not *in pari materia* with the MPLA, is meaningless to this Court's task of construing Section 55-7B-2(c). Thus, the fact that pharmacies are "providers of health care services" under the federal Medicare law, they are not "health care providers" for purposes of the State Health Care law.[2] W. Va. Code § 16-29D-2(c), is not controlling, as those statutes are not *in pari materia* with the MPLA.

E. "Including But Not Limited To".

The words "including but not limited to" ordinarily might provide discretionary grounds

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[2] W. Va. Code § 16-29D-2(c) provides:

(c) "Health care provider" means a person, partnership, corporation, facility or institution licensed, certified or authorized by law to provide professional health care services in or outside this state to an individual during this individual's medical care, treatment or confinement. For the sole purpose of this article, pharmacists and pharmacies shall not be considered health care providers.

to expand a specifically enumerated list. However, when construing W. Va. Code § 55-7B-2(c), this Court should not disregard the undisputed legislative intent: The Conference Committee members intentionally and purposefully omitted pharmacies from the enumerated list. See, attached Affidavits. In this case, on these facts, the list of who or what is a "health care provider" for purposes of the MPLA may not be expanded to include pharmacies. The evidence is overwhelming that pharmacies were intentionally and purposefully excluded.

F. *SHORT* is not controlling.

In 1998, this Supreme Court of Appeals held in *Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246, 507 S.E.2d 124 (1998), that an emergency medical services provider and emergency medical services are subject to the provisions of the MPLA, even though not expressly included[3] within the MPLA definition of "health care provider." *Short* is not authority to add pharmacies to the MPLA defined term "health care provider" because they do not fall within the original intended class to be covered under the Act. They are, in fact, health care providers defined and set forth in § 55-7B-2(c).

First, EMTs and EMT-like providers are not the same as pharmacies. EMTs actually lay hands on a patient, and are solely responsible for that patient's well-being in first responder emergency situations, and during transport. Unlike EMTs, pharmacies do not have an independent medical professional relationship with a patient — their relationship is derivative only — requiring first a physician to issue a drug prescription to the patient, and then the patient seeks to have the prescription filled at the pharmacy. No professional relationship arises between a pharmacy and a mere customer. Only with the pre-existing and prerequisite doctor-patient

[3] The Legislature in 2003 amended MPLA to include providers of emergency medical services within the statutory definition of "health care provider" - - not pharmacies.

relationship will a pharmacy develop a professional relationship with the patient. Without a pre-existing doctor-patient relationship, a patient in a drug store is, simply, a mere customer. In *Kroger Co. v. Estate of Hinders*, 773 N.E.2d 303 (Ind. Ct. App. 2002), the Indiana Court of Appeals properly distinguished the patient and "health care provider" relationship from the customer & pharmacist relationship:

> In every relationship between a patient and one of the listed health care providers under Indiana Code section 34-18-2-14, independent medical treatment is an important component of the health care provided. This characteristic is lacking in the relationship between a pharmacist and a customer simply requesting that a prescription be dispensed.

Kroger Co. v. Estate of Hinders, 773 N.E.2d at 307. The "independent medical treatment" component of the relationship between EMTs and patients is what makes the *Short* decision proper. The lack of "independent medical treatment" between a pharmacy customer and the pharmacy makes it improper for this Court to add pharmacies as "health care providers" under the MPLA, particularly when they were not included as a member of the original intended class to be covered under the MPLA.

The Legislature agreed with the *Short* ruling and acted appropriately when it amended the law to reflect adding emergency medical service authority or agency to the class of people covered. These are persons or entities who fall within the class that the Legislature, in 1986, intended to be covered. Twenty years ago the public did not have the luxury of today's emergency medical teams rapid response to an accident where there are qualified medical personnel and equipment to treat at the scene and during transport to a hospital.

In *Kroger, supra*, the court was asked to give a judicial interpretation of the statutory phrase "or others" as to whether it encompassed pharmacies and pharmacists. The Indiana Court of Appeals refused. *Kroger Co. v. Estate of Hinders*, 773 N.E.2d 303 (Ind. Ct. App. 2002)(construing Ind. Code § 34-11-2-3). The Indiana court found that Indiana's medical

malpractice statute of limitations was intended to apply only to medical health care professionals, and that pharmacies did not come within its scope. The *Kroger* court looked to "the historical application and evolution of this statute, in addition to the definitions in the medical malpractice statutes, for guidance." *Kroger Co. v. Estate of Hinders*, 773 N.E.2d at 305-306. The Indiana court noted first that a medical malpractice liability crisis was ongoing across the nation in the mid 1970's, and also noted that all of the statutorily defined "health care providers" provide "independent medical treatment" as the health care provided, but that single component "is lacking in the relationship between a pharmacist and a customer simply requesting that a prescription be dispensed." 773 N.E.2d at 307. The court also commented that no evidence had been presented that pharmacies, or pharmacists, had faced or currently are facing difficulty obtaining malpractice insurance. Id.

The case at bench is very like *Kroger Co. v. Estate of Hinders, supra*: The statute at issue was passed in the wake of a medical malpractice liability crisis. Indiana and West Virginia enacted a professional medical liability act to address problems arising from that crisis. At the time, there was no crisis underway in the pharmacy industry, and there is none today.

G. Recent Failed Efforts to Add Pharmacies.

During the 2005 Regular Session of the West Virginia Legislature, House Bill 2871 [Exhibit "F" attached hereto] and Senate Bill 491 [Exhibit "G" attached hereto] were introduced in each respective chamber in an attempt to amend the MPLA definition of "health care provider" to include pharmacies and pharmacists. Neither bill, or proposed amendment, reported out of committee or, in simpler terms, passed. Thus, the Legislature actually had proposals to amend the MPLA in 2005 to specifically include pharmacies and pharmacists as "health care providers," and the proposed amendments failed. House Bill 2871, introduced March 4, 2005, would have "clarified" that "pharmacies" are included in MPLA. 2005 W. Va. Reg. 1163

(3/4/05). Senate Bill 486, introduced March 8, 2005, could have "amended" the MPLA to add "pharmacists and pharmacies" had it passed. 2005 W. Va. Reg. 1501 (3/8/05).

The 2005 Legislature was presented with the opportunity to amend the MPLA, and it did not act. The 1986 Legislature clearly did not intend to include pharmacies under the MPLA (see, Affidavits, attached hereto). Courts should not create laws under the guise of judicial interpretation when the legislature had the opportunity to act, and chose not to. *Miners In General Group v. Hix*, 123 W. Va. 636, 656-67, 17 S.E.2d 810, 820 (1941), *overruled on other grounds*, *Lee-Norse Co. v. Rutledge*, 291 S.E.2d 477 170 W. Va. 162, 291 S.E.2d 477 (1982).

H. Not in Issue — "Pharmacist".

The Petitioners did not sue any individual pharmacist, so whether a "pharmacist" is a "health care provider" under the MPLA is not in issue, even though it is Petitioners' position that, in this instance, they, too, are not part of the original intended class to be covered under the MPLA. The certified question only addresses whether "**pharmacies**" are included under the MPLA. Therefore, this Court need not answer at this time the unripe question of whether a "pharmacist" is included within the MPLA's definition of "health care provider". The Petitioners sued a pharmacy.

I. McDowell v. Rite Aid – Unpublished Circuit Court Order.

The circuit court erroneously followed the "reasoning" of *McDowell v. Rite Aid of West Virginia, Inc.*, Civil Action No. 04-C-174-S (Cir. Ct. of Mercer County, W. Va., 9/21/2004 Order Granting Motion To Dismiss). First, *McDowell* is merely an "order" from a circuit court, and is not binding precedent. The Boone County circuit court based its ruling on and seemed to agree with Judge Swope's Order in *McDowell*.[4]

[4] The undersigned attempted to review the *McDowell* court file to verify the settlement, dismissal of the suit, and other items filed therein, but was informed by the clerk of the court that

Second, *McDowell* was settled prior to entry of the Order of September 21, 2004. Attorney Thomas Janutolo represented plaintiff McDowell. Mr. Janutolo reported to the undersigned in a phone conference in April 2006 that Rite Aid, a pharmacy, had brought a motion to dismiss claiming that the MPLA applied to McDowell's case, alleging McDowell had not complied with pre-filing requirements set out in the MPLA. Mr. Janutolo argued against the motion to dismiss on September 3, 2004 because Rite Aid was not under the class defined as a "health care provider" under the MPLA. Defendant Rite Aid had filed in support of its motion a statement[5] dated 8/13/2004 from Executive Director and General Counsel of the W. Va. Board of Pharmacy, William T. Douglass, Jr.

The circuit court erred in relying on an unsworn written opinion from the Executive Director of the State Board of Pharmacy, which should be disregarded entirely. The document is dated August 13, 2004, and is purportedly authored by the then Executive Director and General Counsel of the West Virginia Board of Pharmacy, William T. Douglass, Jr. Respondent Larry's Drive-In Pharmacy had presented the Douglass document in opposition to Petitioners' motion *in limine*.

The seven member Board of Pharmacy has five practicing pharmacists and two non-pharmacist members who are appointed by the Governor for a term of five years. W. Va. Code § 30-5-2. It is the duty of the Board to protect the public health, safety, and welfare by the effective regulation of the practice of pharmacy; the licensure of pharmacists; the licensure and

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the file had been sealed and was not available for review.

[5] This is the very same statement that Respondent Larry's Drive-In submitted in the circuit court in the case at bench, and on which Judge Schlaegel apparently relied.

regulation of all sites or persons who distribute, manufacture, or sell drugs or devices used in the dispensing and administration of drugs or devices within the state of West Virginia. Id. The Board employs a staff to process applications for licenses and permits, to inspect pharmacies, and investigate complaints or situations which may be in violation of pharmacy laws or regulations. Mr. Douglass is not a member of the Board of Pharmacy. He is the head of the staff that processes the license applications and handles complaints and allegations of violations.

Even if Mr. Douglass was a board member (which he is not), the West Virginia Board of Pharmacy is not a proper law-making authority, and neither the West Virginia courts nor Legislature may delegate law-making decisions to the Board of Pharmacy. See, *Foundation For Independent Living, Inc. v. The Cabell-Huntington Board of Health,* 214 W.Va. 818, 591 S.E.2d 744 (2003); *State v. Grinstead*, 157 W.Va. 1001, 206 S.E.2d 912 (1974) (permitting Board of Pharmacy to create statutory definitions was unconstitutional & legislature cannot delegate its authority to enact laws to an agency which is a unit of the executive branch of the state government).

Mr. Douglass did not and does not have rule making authority. Neither the Legislature, nor the Governor, has delegated to Mr. Douglass any discretion to decide if a pharmacy is, or is not, a provider of health care services within the meaning of the MPLA. Thus, this self-serving hearsay statement is merely Mr. Douglass's opinion, for what it is worth, and not binding precedent which this Court must adopt or follow.

Mr. Douglass's written statement is his personal opinion, which he saw fit to issue on the stationery of the Board of Pharmacy. He obviously provided this document in August 2004 to the defense lawyer in *McDowell* to support Rite Aid's motion to dismiss heard and argued on September 3, 2004. Rite Aid apparently has been using the *McDowell* "order" and the Douglass "opinion" for two years as "legal authority" to leverage settlements.

Mr. Janutolo told the undersigned that *McDowell v. Rite Aid* was settled by verbal agreement in the afternoon right after the hearing was held on Rite Aid's motion to dismiss on September 3, 2004. The undersigned asked for a copy of the release and settlement documents, but a confidentiality clause in the *McDowell v. Rite Aid* settlement prevented Mr. Janutolo from disclosing the terms of the settlement. None the less, *McDowell* was settled almost two weeks before entry of the "Order" entered September 21, 2004 and prior to the court's ruling on Rite Aid's motion. Thus, the *McDowell* Order lacks not only precedential effect, but also lacks credibility. That order is null and void, as settlement of the underlying litigation mooted all pending issues, and rendered further rulings null and void.

Lastly, the *McDowell* "Order" is not a reasoned opinion of the trial judge, but rather is the biased work product of the defense attorney representing Rite Aid. The usual and customary manner of closing a court file after a case is settled is to have the defense attorney prepare a proposed Order or Stipulation of Dismissal With Prejudice, which counsel for all settling parties review, approve and sign, and then submit that proposed order to the court, which then enters it of record. In *McDowell*, obviously, the defense counsel prepared a proposed order which reads like a reasoned opinion. It gives the appearance that the case was dismissed based upon the motion to dismiss rather than that the case had been settled. The dismissal order which was entered reflects the opinion of the defense attorney, not the circuit court, and does not reference the settlement.

J. Professional Status Not Controlling.

Pharmacists are clearly professionals. The practice of pharmacy is a time-honored profession which requires advanced education, training, continuing education, and licensure. W. Va. Code § 30-5-1 et seq. But being a professional, and being open to potential suits for malpractice, does not make a pharmacist, nor his employer pharmacy, a "health care provider" for purposes of the MPLA. The pharmacist's area of specialty is dispensing drugs and providing drug counseling -- not providing health care.

Not all professionals in West Virginia are "health care providers" under the MPLA. West Virginia has chosen to regulate the practice of professionals such as attorneys, accountants, funeral embalmers, hearing aid dealers, barbers, dieticians, cosmetologists, and engineers, and requires all to undergo mandatory state-licensing and mandatory continuing education. See generally, Chapter 30 of the W. Va. Code. However, these professionals do not provide "health care" and are not "health care providers" and are not covered by the MPLA. Pharmacies and pharmacists, likewise, are professionals, but they do not provide health care. They provide pharmaceutical care and drug counseling.

Being a "member of the healthcare team," as alleged in the Petitioners' Complaint, does not confer the status as "health care provider" under the MPLA.

V. The Legislature, not the Court, is the Proper Body to Amend Statutory Language.

If the Legislature had wanted to include pharmacies, it could have, but it chose not to do so. This undisputed fact has been proven by affidavits from five highly regarded witnesses, who all have personal knowledge of what the Joint Conference Committee members intended in 1986 when they drafted the MPLA and formulated its definition of "health care provider." "Courts are not disposed to legislate into statutes, by interpretation, a meaning which the legislature itself, when offered opportunity to do so, is unwilling to sponsor." *Miners In General Group v. Hix*,

123 W. Va. at 656-67, 17 S.E.2d at 820. Likewise, this Court should refrain from legislating from the bench.

In 1986, members of the legislative drafting committee considered whether to include pharmacies within the meaning of the MPLA. The original drafters expressly rejected the proposal to include pharmacies. See, Chambers, Shaw, Tucker, Rogers and Chafin Affs. attached hereto. Again in 2005, certain members of the Legislature proposed two separate amendments to the MPLA's statutory definition of "health care provider," and those more recent efforts failed. If the Legislature had wanted to include pharmacies in the MPLA definition of "health care provider," it could have done so. The omission in 1986 was clearly intentional, and the failure of the Legislature to act in 2005, when given the opportunity, indicates intent to exclude pharmacies from the MPLA.

If the people of West Virginia, or the lobbyists for the pharmacy industry, believe that a pharmacy should be included in the MPLA definition of "health care provider," then they should contact their senator or representative, and initiate, again, an amendment to the statute.[6] The West Virginia Senate and House of Delegates which together comprise the Legislature of West Virginia, not this Supreme Court of Appeals, is charged with creating and amending state statutes. W.Va. Const. Art VI, Sect. 1.

VI. Other States.

Other jurisdictions treat pharmacies in three basic ways for purposes of those states' medical professional liability acts. A few have specifically named pharmacists or pharmacies, or both, in the statutory definition of "health care provider." Those jurisdictions simply have a

[6] This was attempted during the 2005 legislative session by the introduction of House Bill 2871 and Senate Bill 491. It is no mere coincidence that the law firm representing Rite Aid in the *McDowell* case is the same firm who authored the Order that was entered by the *McDowell* court and is the same firm whose senior partner was the registered lobbyist for Rite Aid.

different law.

Arkansas, Colorado, Louisiana, Missouri, South Carolina, Texas, Virginia and Washington have specifically included pharmacists or pharmacies, or both, in the statutory definition of "health care provider." Ark. Code. Ann. § 16-114-201(2) (names "pharmacist" within the definition of "medical care provider"); Colo. Rev. Stat. § 13-64-202(4)(a) (person licensed to practice pharmacy named in statutory definition of "health care professional"); La. R. S. 40:1299.41A (pharmacist included as provider of professional services and therefore a "health care provider"); Mo. R.S. 516.105 (pharmacists named as "health care provider" in medical malpractice statute of limitation); S.C. Code Ann. § 38-79-410)(statute of limitations for medical malpractice actions names pharmacists); Tex. Rev. Civ. Stat. Ann. Art. 4590i, § 103 (Vernon Supp. 1995) (names pharmacist in definition of "health care provider"); Va. Code. Ann. § 8.01-581.1 (names pharmacist in definition of "health care provider"); Wash. Rev. Code § 7.70.020(1) (1995) (names pharmacist in definition of "health care provider"). If the West Virginia Legislature had wanted to include pharmacies in the statutory definition of "health care provider," then the Conference Committee members would have used the word "pharmacy" or "pharmacies," or both, in the statutory definitions, and they on purpose chose not to do so. See, attached Affidavits.

In jurisdictions where the governing statute is silent or ambiguous, some courts refuse to expand the scope of the statute, yet others are willing to do so. If a sister state's definition of "health care provider" within its medical malpractice liability protection act were identical to the language of W. Va. Code § 55-7B-2(c) (1986), then that sister state's treatment of the issue might be relevant and persuasive, but the undersigned has not located any identical statute from any other jurisdiction.

Florida, Indiana, and Maryland have omitted pharmacies and pharmacists from their statutory definition of "health care provider," and **courts have refused to expand the scope of those statutory definitions by judicial interpretation**. *Sova Drugs, Inc. v. Barnes*, 661 So. 2d 393 (Fla. Dist. Ct. App. 5th Dist. 1995) (pharmacy not "health care provider" under Medical Malpractice Reform Act); *Kroger Co. v. Estate of Hinders*, 773 N.E.2d 303 (Ind. Ct. App. 2002) (pharmacist not "health care provider" under medical malpractice act, Ind. Code. § 34-18-2-14); *Mancuso v. Giant Food, Inc.*, 327 Md. 344, 352, 609 A.2d 332, 336 (1992) (pharmacist not "health care provider" under medical malpractice act, Md. Code. Ann. Cts. & Jud. Proc. § 3-2A-01).

Courts in Alabama and Arizona have **expanded** the scope of their **ambiguous** statutes to include pharmacists or pharmacies, or both, *as a* health care provider, or a medical care provider. *Ex parte Rite Aid of Alabama, Inc.*, 768 So. 2d 960 (Ala. 2000)(construing Ala. Code § 65481(1)&(8) & § 6-5-551 to include pharmacies); *Cackowski v. Wal-Mart Stores, Inc.*, 767 So. 2d 319 (Ala. 2000)(construing Ala. Code § 65481(1)&(8) to include pharmacists); *Lasley v. Shrake's Country Club Pharmacy*, 179 Ariz. 583, 586-87, 880 P.2d 1129, 1132-33 (Ariz. App. 1994) (construing Ariz. Rev. Stat. § 12-561).

Ohio has inconsistent reported decisions: In *Reese v. K-Mart Corp.*, 3 Ohio App.3d 123, 124, 443 N.E.2d 1391, 1392 (1981), the court found that the statute of limitations applicable to malpractice actions did **not** apply to pharmacists because Ohio R. Code § 2305.11(A) did not specifically include pharmacists. In direct conflict with *Reese* is the earlier case of *Boudot v. Schwallie*, 114 Ohio App. 495, 496, 178 N.E.2d 599, 599-600 (1961), where the court held the one-year statute of limitations applicable to medical malpractice actions does apply to a suit against a pharmacist.

Michigan is in a category all by itself. The Michigan statute does not name pharmacies or pharmacists as a "heath care provider." The Michigan courts have ruled that pharmacists are health care providers, *Becker v Meyer Rexall Drug Co.*, 141 Mich. App. 481, 485, 367 NW2d 424, 426 (1985)(holding that **pharmacist** is licensed health care professional under Mich. Comp. Laws § 600.5838a(1)(b)) and is due protection of shorter statute of limitation applicable to medical malpractice claims); but that pharmacies are not. *Kuznar v. Raksha Corporation*, #259502, ___ Mich. App. ___, ___ N.W.2d ___, 2006 WL 2423426 (Mich.App. Aug. 22, 2006) (holding that **pharmacy** defendant not entitled to medical malpractice statute of limitations because a pharmacy cannot be a "licensed health facility or agency" under Mich. Comp. Laws § 600.5838a(1)(a).

VII. Conclusion.

The Petitioners have presented undisputed evidence that the drafters of the MPLA purposefully excluded pharmacies (and pharmacists) from the definition of "health care provider" as contained in W. Va. Code § 55-7B-2(c). The conference committee members undisputedly discussed whether to include pharmacists and pharmacies and purposefully decided against inclusion. Lobbyists for the drug industry appeared before the Conference Committee and specifically asked that pharmacies and pharmacists be excluded. When presented with this clear evidence of legislative intent, the Court must follow that intent, and hold that "health care providers" as used in the MPLA does not include pharmacies, particularly based upon the filing date of the Petitioners' Complaint.

In 2007 or future years, the West Virginia Legislature may amend the MPLA using clear language to specifically include pharmacists, pharmacies, and any other class of persons or entities. To date, the West Virginia Legislature has not amended the MPLA to specifically include pharmacies.

RELIEF PRAYED FOR

Petitioners request that this Honorable Court answer the certified question by ruling that pharmacies are not included as "health care providers" for purposes of the MPLA. Therefore, Petitioners pray for an Order reversing the ruling of March 16, 2006 from the Circuit Court denying Petitioners' motion *in limine*, and remanding this case for further proceedings in light of these new rulings, including direction to the trial court to grant Petitioners' motion *in limine*.

Petitioners further pray that costs be assessed pursuant to W. Va. R. App. Proc. 13(h).

Respectfully submitted,

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IN THE

SUPREME COURT OF APPEALS

OF

WEST VIRGINIA

No. 06-1511

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,

Petitioners/Plaintiffs,

v.

LARRY'S DRIVE-IN PHARMACY,
INC., a West Virginia corporation,

Respondent/Defendant.

CIVIL ACTION NO. 04-C-33
(Boone County Circuit Court)

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true copy of the BRIEF OF PETITIONERS ON CERTIFIED QUESTION has been furnished, by regular course of the United States Postal Service, this **25th** day of **October, 2006,** to: JAY M. POTTER, ESQ., Schumacher, Francis & Nelson, P. O. Box 3029, Charleston, WV 25331, Fax No. (304) 342-4575, EMAIL – jpotter@sfnlaw.com, Counsel for Larry's Drive-In Pharmacy, Inc.

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife
By Counsel

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